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IN THE

Supreme Court of the United States

No. 343

BRISTER & KOESTER LUMBER CORPORATION,
Petitioner,

v.

EDGAR C. TURNEY, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

ARTHUR G. WARNER,
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To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the finel judgment of the United States Emergency Court of Appeals (p. 125), filed on August 25, 1949, which dismissed the complaint filed by the petitioner in the United States Emergency Court of Appeals (pp. 110-113), against an order of the respondent Director dated April 13, 1949 (pp. 91-93), denying the protest filed by the petitioner on September 26, 1947 (pp. 1-13) protesting Revised Maximum Price Regulation 19, issued April 26, 1943, effective April 23, 1943 (8 F. R. 5536) and Second Revised Maximum Regulation 19, issued January 29, 1944 effective, February 4, 1944 (9 F. R. 1162).

The Opinions Below.

The protest first was filed with the respondent Director of the Division of Liquidation, who, in his order appointing a Board of Review, set forth his own tentative views with respect to the issues raised by the protest (pp. 80-90).

The three members of the Board of Review differed in their report and recommendation. The majority recommended denial of the protest (pp. 94-104); the minority recommended the granting of the protest (pp. 104-108).

The respondent Director adopted the recommendation of the majority of the Board, and, in his order and opinion (pp. 91-93), denied the protest.

After the complaint was filed in the United States Emergency Court of Appeals from the order denying the protest, that Court dismissed the complaint with an opinion (pp. 119 to 124).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 204 of the Emergency Price Control Act of 1942 as amended (50 U. S. C. A. §924) and Section 240 of the Judicial Code as amended (28 U. S. C. A. §347).

Question Presented.

The question presented for review by this Court is:

Did the imposition by the Price Administrator of a penalty on Southern pine wholesalers, including petitioner, for acts of other persons over whom they had no control and of whose acts they neither had nor could have had knowledge, and which acts they were powerless to prevent, deny to petitioner its rights under the Fifth Amendment to the Constitution of the United States.

Statement of the Case.

This petition is based upon the judgment of the Emergency Court of Appeals dismissing the complaint filed against the denial of petitioner's protest against Revised Maximum Price Regulation 19 and Second Revised Maximum Price Regulation 19. Inasmuch as both Regulations are identical, insofar as the particular relevant provisions are concerned, we will deal with them as one and refer to them as "MPR 19".

The challenged Regulations deal with the sale of Southern pine lumber by direct mill shipment. That is a very definite and limited kind of business. It consists of a sale of lumber by shipment from a mill directly to a retailer.

The petitioner is a wholesaler and is typical of one of the three classes of business organizations involved in this industry. The mills manufacture the lumber and they sell, in most cases, to wholesalers, who, in turn, sell to retailers. The mill cuts, grades and ships the lumber.

The wholesalers do not maintain yards. The lumber is never in their possession. In fact they never see the lumber, which is shipped, in carload lots, by direct mill shipment from the mills to the retailers, pursuant to orders placed with the mills by the wholesalers (p. 3).

The wholesalers, of course, do not, and, in the normal course of business, cannot, inspect the lumber prior to its shipment from the mill to the wholesalers' customers. The wholesalers have no knowledge of the grades and specifications of the shipment before or after it is delivered to the customer. The wholesalers bill according to the invoice received by them from the mills (p. 3).

The Director himself, in his order closing the record and appointing the Board of Review, described the complainant's business as follows (p. 81):

> "The Protestant (petitioner) is a wholesaler of Southern pine lumber, and made, during 1943 and 1944 in particular, numerous sales of such lumber by "direct mill shipment" to the buyers; that is, the Protestant would purchase and take title to lumber at a mill, and have that lumber shipped by the mill directly to the purchaser, instead of itself taking physical possession of the lumber and shipping it. As a result, of course, the Protestant, when filling an order for lumber, relied completely upon the shipping mill to conform the shipment to the grades and types of lumber specified in the order, on the basis of which the prices to be paid were determined."

In addition to marketing the mill's production and supplying the needs of retail yards and large industrial consumers, wholesalers have been an essential and valuable part of the lumber industry at all times in the past. They know how and where to buy and how to assemble a schedule, the specifications of which may require the division of an order over many mills to meet the limitations of their particular stocks and facilities and the time factor. Their advice is sought as to the size, grade and the specie of lumber best suited to a particular need. They help to solve problems of supply and transportation. They arrange for kiln drying, resawing and planing. They extend financial assistance to small retail yards. They finance small mills and assist them in solving their various business and production problems (pp. 3-4).

The value of the function of the wholesaler is not, of course, subject to question, but it is material. It was expressly recognized by the Administrator, who provided by

special amendment for the payment of an additional compensation, amounting to 6% of the ceiling price, to be paid to the wholesaler. In other words, where a mill sold directly to a retailer and billed the retailer, the charge was fixed at the ceiling price. But, where the mill sold through the wholesaler, the wholesaler was permitted to add a 6% mark-up to such ceiling price.

The Statement of Considerations of the Price Administrator, issued in connection with Amendment 5 to Revised Maximum Price Regulation 19 is attached hereto in the Appendix, and clearly explains the necessity for the wholesalers' services.

At all times prior to the establishment of price control there were, naturally, disputes concerning the grades and specifications of lumber. These disputes were invariably, as a matter of trade practice, custom and usage, handled in the following manner:

If, upon receipt of a shipment of lumber by a retail dealer, there was a complaint about grades or quantities, the buyer was required to file a complaint with the wholesaler within ten days from receipt of the shipment and was required to hold the disputed lumber intact for thirty days for official inspection.

Upon receipt of a complaint from the purchaser, the seller could immediately request the Southern Pine Inspection Bureau to provide official re-inspection or re-tally. A shipment has always been considered to be of the grade invoiced if, upon official SPIB re-inspection, 95% thereof or more is found to be of the said grade. Payment is made according to the results of the re-inspection which are binding on both the buyer and the seller.

No claim could be made for wrong tally or grade unless the above provisions were complied with.

These rules regarding complaints and re-inspection have always been an integral part of the Southern pine lumber industry.

Included in the protest are a series of affidavits from persons prominent in every branch of the industry. There are included affidavits of manufacturers, of wholesalers, of retailers, of executives of trade associations, the editors of the largest trade papers, and well known and reputable persons in all branches of the Southern pine lumber industry, including buyers and sellers, manufacturers, wholesalers and retailers (pp. 18-79).

As to the established universality of this method of handling trade disputes, there is no question of fact. The respondent himself accepts the proof which is submitted here of the existence of this trade practice. In his order closing the record, the Director himself has said that there is no dispute of fact in this matter (p. 80).

These customs and usages were incorporated in the rules of the Southern Pine Association which covers substantially 100% of the Southern pine lumber industry. When, on May 28, 1940, the Southern Pine Inspection Bureau took over the relevant duties of the Association, the Southern Pine Inspection Bureau adopted the same rules.

The necessity for and the logic of this arrangement is clear. The wholesaler fulfills the function of a broker. For the services he renders he receives a fraction of the mill's sales price as a commission. His title is merely a security title to insure that he can make good, as against the retailer, his financial commitment to the mill. He, rather than the mill, invoices the retailer, so that he can protect his economic position by not revealing his sources.

He neither can nor does ever see the lumber. If, therefore, he was held liable on the complaint of the retailer,

without any opportunity to check the complaint, or inspect the lumber, he would be completely at the mercy of the mill and the retailer. No sane business man could accept such a position.

In order, therefore, to insure that the wholesaler could perform his essential function, without being at the mercy of the retailer and the mill, the industry protected him by affording him an opportunity, if there was a complaint, to defend himself by inspection. These rules are, therefore, as essential to the wholesaler's function as the provision for his compensation.

The question sought to be reviewed makes the issue clear. The petitioner contends that a wholesaler may not be held liable for billing at the mill's ceiling price, as established by the mill's invoice, where, by the uncontroverted facts, he neither has nor can have any knowledge of the actual grades and specifications of the lumber shipped. On the other hand, the respondent contends that even though the wholesaler can have no knowledge whatever of the contents of the shipment, nevertheless, he is liable for the mill's violations, both criminally and civilly, to the extent of three times the amount by which the mill's invoice exceeds the proper price.

Based on that theory the OPA has commenced an action, which is now pending in the United States District Court for the Southern District of New York, against the complainant. In that action, the government demands $600,000 treble damages for alleged violation based on no sales concerning which the complainant received notice of alleged shortages or upgrading (p. 10).

The Manner in Which the Question Sought to be Reviewed Was Raised and Treated Below.

The petitioner's affidavits, submitted in support of the protest, stated that the wholesalers do not and cannot inspect the lumber prior to its shipment from the mills to the wholesalers' customers (p. 3).

The entire protest was heard and decided on the petitioner's affidavits. The government offered no evidence whatever. The entire protest was decided solely on the basis of the facts presented by the petitioner.

On the record, therefore, it is uncontroverted that Southern pine wholesalers do not and cannot, on direct mill shipment, inspect the lumber prior to its shipment from the mill to their customers.

Petitioner argued, therefore, in its protest, that the Regulations violated the Fifth Amendment to the Constitution in that they deprived Southern pine wholesalers, including petitioner, of liberty and property without due process of law by penalizing the wholesalers for committing violations when they have and can have no knowledge that they are violating (p. 12, Pt. 3).

The respondent-Director, in his order and opinion closing the record, submitted to the Board of Review the questions which he (the Director) thought were raised by the protest (pp. 80-90). The Director overlooked completely the contention that under due process of law, a person who did not and could not know of a violation and had no means of preventing its commission, could not be held liable therefor. Accordingly, that question was not even submitted by the Director to the Board of Review for its opinion (pp. 89-90), and, instead, the only constitutional point submitted by the Director to the Board of Review was the question whether the punishment was excessive.

The Board of Review, guided by the Director, failed to recognize the constitutional point here discussed, and, instead, confined itself to the discussion of whether the Regulations were unconstitutional because they provided for excessive penalties (p. 96, Pt. 3).

The Director and the majority of the Board of Review, in denying the protest, proceeded on the uncontroverted facts that Southern pine wholesalers have and can have no knowledge of the contents of the lumber shipped. They did not, however, consider the constitutional question of whether wholesalers, who do not and could not have knowledge of the violations and do not and could not have any control over the shipping mill, could be punished civilly and criminally for the mill's violations.

In dismissing the complaint and sustaining the Regulations, the Emergency Court of Appeals, however, stated that it would have been quite possible, "though perhaps a bit inconvenient", for petitioner to have sent employees to check the shipments before they left the mills, in order to prevent violations (p. 123).

The suggestion by the Emergency Court of Appeals has no support whatever in any of the factual record before it. Nowhere was it controverted that wholesalers could not check shipments before they were shipped and, in fact, it would have been quite impossible for that to have been done.*

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* The Director introduced no evidence to controvert the statements in the protesting affidavit that the wholesaler could not inspect the shipments before delivery. No further evidence was, therefore, necessary to sustain the contention. The Director was, of course, familiar with the nature of the business and the number of mills and retailers with whom a typical wholesaler had to deal. For example, during a typical year, petitioner had more than 5000 different direct mill shipments being delivered by more than 200 different mills, in six different Southern states, to more than a thousand different retailers or users, located in nine different Northern and Eastern states. And petitioner is only one whole-

The Emergency Court of Appeals, in justification of its position, found that where wholesalers, selling by direct mill shipment, cause the mill to send lumber directly to the wholesalers' customers, that act constitutes the mill the wholesalers' agent so as to subject the latter (who did not and could not, under the Regulations, have any connection with or control over the mill) to the penalties under the Emergeny Price Control Act (p. 123).

The Emergency Court of Appeals went much further, however, and in a ruling of far reaching importance, held immaterial the fact that wholesalers do not have and could not have any knowledge of the violations of the Regulations. The Court ruled that wholesalers were liable for acts of the mill of which they (the wholesalers) had no knowledge, over which they had no control, and which they were powerless to prevent (pp. 122-123).

Specification of Errors.

The United States Emergency Court of Appeals, in the decision sought to be reviewed, erred in the following respects:

1. Since the uncontroverted evidence in the record was to the contrary, the Court erred in making a finding of fact that wholesalers, selling by direct mill shipment, could inspect the lumber before it was shipped by the mill to the retailers.

2. The Court erred as a matter of law in finding that the mere fact that a wholesaler ordered lumber shipped

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saler out of more than 1200 in the country (p. 4, and sources in footnote). Obviously, it would be a physical impossibility for all these wholesalers to have inspectors at all the mills inspecting the shipments. And a reading of the Statement of Considerations in the Appendix makes it clear that the wholesalers were never expected to make such an inspection.

by direct mill shipment from the mill to the retailer, constituted the mill as the wholesaler's agent so as to subject the wholesaler to all of the civil and criminal penalties for the mill's violation under the Emergency Price Control Act.

3. The Court erred as a matter of law in ruling that a federal administrator could, by regulation, subject wholesalers to civil and criminal penalties for violations committed by mills, in cases where the wholesalers did not and could not have any knowledge of the mills' violations, had no control over the violators and were powerless to prevent violations.

Reasons for Granting the Writ.

This case involves a fundamental question of substantial importance which has not been, but should be, settled by this Court.

The Emergency Court of Appeals has ruled that a federal administrator may, by regulation, subject a person to serious civil and criminal penalties for an act of another person when the former does not have and cannot have any knowledge of the violation of the regulations. The Emergency Court of Appeals has held, further, that such penalties may be imposed on a person for violation of such regulations even though such person does not and cannot have any knowledge of the alleged illegal acts, even though he has no control of or connection with the person committing them and despite the fact that he is powerless to prevent the commission of the acts.

This represents a revolutionary extension of the power of a federal administrator. It removes restraints on administrators which, generally, have always been consid-

ered to be established by the Constitution. Such an extension of the power of federal administrators serves no useful purpose.

Prior to the decision sought to be reviewed herein, penalties, whether civil or criminal, could, constitutionally, be imposed only to compel people to perform some required act or to refrain from performing some prohibited act. In this decision, the Emergency Court of Appeals has laid down the rule that a penalty may be imposed upon a person even though he is powerless to do or refrain from doing anything to prevent the act.

The petitioner's position here illustrates the effect of such a rule and the extent of the power granted by it. The petitioner would forward to the mills the orders received from the retailers. The mills would send the shipments directly to the retailers and forward invoices to the petitioner. This was the procedure expressly authorized and encouraged by the Price Regulations, the principal purpose of which was to develop and expand the practice of direct mill shipment (see Statement of Considerations for Amendment 5, in the Appendix).

Petitioner would have the mills' invoices checked against the appropriate OPA regulations and the prices verified by petitioner's staff, at great expense and inconvenience, draw up its own invoices based on the mills' invoices, adding its legitimate 6% commission, and send the invoices to the retailers. Thereafter, in due course, if it received no complaint or objection, petitioner would receive payment from the retailer.

After conducting its business in this manner as it always had, the petitioner was suddenly notified by the government that, for various transactions involving hundreds of mills, over a thousand retailers and thousands

of shipments, in none of which did it have any knowledge concerning the nature of the lumber shipped and over none of which it had any control, that petitioner owed the government $600,000 as a penalty.

What is the position of wholesalers, including the petitioner, in such a situation? The government contends that petitioner is liable to the fullest extent for the penalties imposed by the Emergency Price Control Act, for the mills' violations. Yet petitioner had no knowledge and could have had no knowledge of the contents of any of the thousands of shipments. Neither the mill nor the retailer was his agent nor in his employ, and the Regulations specifically forbade any connection between them. Aside from checking invoices, which was carefully done, there was nothing the petitioner or any other wholesalers could do or refrain from doing to prevent the mills' overcharges.

In such a case, it seems clear that wholesalers, including the petitioner, are deprived of their liberty and property without due process of law.

The position of Southern pine wholesalers, including this petitioner, has been well stated by Judge Parker in his dissenting opinion in *Porter* v. *Bledsoe,* 159 Fed. 2d 495, 500 (C. C. A. 4, 1947) where he said:

> "There is a manifest difference between a seller who makes delivery through his own organization and who should be charged with knowledge of what is done by his agents and servants, and one, like the defendant here, who is little more than a sales agent and who depends upon an independent organization for making delivery under his contracts. To penalize one in the latter position for violation of regulations by those over whom he has no control, when he does not participate in or have knowledge of such violations is not required by anything con-

tained in the statute or in any of the regulations adopted thereunder. No case has been cited to us where a broker or wholesaler, relying on invoices or certificates, has been held liable for execessive prices, arising without his knowledge from violation of the act by the party from whom he has purchased; and I know of none, and am opposed to establishing a precedent to that effect. The law ought not be interpreted in such a way as to penalize the innocent who have conducted business in good faith according to accepted standards.

To hold that the broker or wholesaler is not liable under such circumstances does not, of course, exonerate the shipper upon whom responsibility for violation of the regulation rests; and it is worthy of note that suits have been instituted against the shippers who filled the orders of defendants here to recover damages on account of the very transactions that are involved in this suit. There is no objection to granting recovery against the wholesaler as well as the shipper, where the former has participated in the violation of regulations of which the latter has been guilty; but this should not be done where the shipper has violated the regulations without participation or knowledge on the part of the wholesaler. This case well illustrates the hardship that may otherwise result to the innocent. Defendants are being held in damages in the sum of more than $13,000 in connection with transactions had before March 1, 1944, which were carried on in entire good faith, and upon which their total profits amounted to less than $3,000. I do not think it could have been intended that this sort of penalty should be visited on a dealer who in good faith made a legitimate contract expecting it to be carried out as made, merely because, without his knowledge, a third person over whom he had no control violated OPA regulations" (159 F. 2d 500-501).

The Circuit Court in that case, however, had no authority to declare the Act or Regulation unconstitutional (*Yakus* v. *United States,* 321 U. S. 414 (1944); *Lockerty* v. *Phillips,* 319 U. S. 182 (1943).

Such a revolutionary extension of the power of the administrative agencies is of tremendous importance in these times. This Court is well aware of the ever expanding activities of our federal agencies and of the increasing control which they have over the lives and property of our citizens. The majority of these controls are now exercised by administrative regulation and not by statute.

The doctrine laid down by the Emergency Court of Appeals should be reviewed by this Court.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decisions.

Respectfully submitted,

ARTHUR G. WARNER,
Attorney for Petitioner.

Appendix.

Statement of Considerations Issued in Connection with Amendment 5 to Revised Maximum Price Regulation 19.

AMENDMENT NO. 5

This amendment establishes a ceiling for wholesalers and yards 6 percent over the mill ceiling, and for commission men 4 percent over the mill ceiling, on direct-mill sales of Southern pine lumber.

SUMMARY

The general outline of the justification of this action may first be indicated in summary form.

(1) Necessity for Southern pine wholesalers' services in the effective prosecution of the war

The Southern pine wholesaler and commission man have normally performed an important function in facilitating the production and accomplishing the distribution of Southern pine. The continuance of this function is essential to the prosecution of the war.

(2) Necessity for special provision for wholesalers' margin

Under normal circumstances the potential supply of Southern pine exceeds the demand at the prevailing market price. The wholesaler has been able, therefore, to purchase lumber below the market level and obtain a margin when reselling at the market level. This was the normal practice in the industry prior to the issuance of Maximum Price Regulation 19.

The conditions of supply and demand have changed during the war. Demand has come to exceed supply. As a result mills can get ceiling prices on direct sales. They therefore need not sell below ceiling prices to wholesalers. The wholesaler's margin has therefore tended to disappear. As a result, the wholesaler is being eliminated from the

picture and his essential services in facilitating production and distribution are being lost.

(3) Necessity for addition to ceiling

This situation cannot be met by requiring a discount from the ceiling on sales to wholesalers because mills cannot be required to make such sales and the wholesalers would not be re-established. It cannot be met by raising the general ceiling and requiring a wholesaler's discount since the wholesalers would still suffer the same competitive disadvantage in obtaining supplies. It can only be met by permitting purchasers to pay more for lumber brought through wholesalers, i.e., by adding a wholesaler's margin to the mill ceiling. This is a consequence of the excess of the demand over supply.

The following statement discusses these points in detail.

(For convenience, and because they are by far the most important factor in distribution of Southern pine, this statement refers only to wholesalers. A separate discussion of commission men and yards appears at the end, and brings out any differences between their situation and that of the wholesalers.)

1. Necessity of Southern pine wholesalers' services in effective prosecution of the war

Services of Southern pine wholesalers are necessary in the effective prosecution of the war in two respects: production and distribution.

As to production, it should first be noted that the production of Southern pine lumber, the largest single lumber species in the country, has dropped to a lower point than that of any other major species. A good comparison, for purposes of analyzing the state of production, is obtained by expressing 1943 output as a percentage of output for a corresponding period in 1942. Southern pine production for some weeks in 1943 has been around 70 to 80 per cent of that recorded in the same week last year, which is a poorer showing than that of any other major species. More-

over, instead of showing a tendency to gain during summer weather, as the other major species have done, Southern pine production has continued to drop.

It is the opinion of many who have studied the problem that most of this loss of production is due to the cessation of production by many small mills, although it is difficult to make any accurate study or analysis of this point. Unofficial estimates by members of the industry have placed the number of mills shut down as high as from several hundred to several thousand. According to an estimate prepared by the Forest Service, one-third of the mills in the area (4010) were shut down for other than seasonal reasons in May 1943. Half of these, however, produced less than 50,000 feet per year and are unimportant in the total production picture. It can be seen that in the largest single species of lumber this is a grave production problem.

The shutdown of small mills is the result of a number of difficulties, the principal one of which is shortage of manpower. The main contention of the wholesalers in urging that some definite provision be made to cover their costs of operation has been that they could assist the small mill in meeting a great many of these difficulties. The wholesalers have normally marketed by far the greatest part of the Southern pine production. They act as the small mill's contact with the outside world while the mill man applies himself to the actual problem of sawing the lumber. The wholesalers have helped the mill to obtain supplies, whereas many mills are now shut down because of their inability to cope with the restrictions in obtaining needed parts and equipment. Similarly, various regulations and restrictions on labor, such as selective service procedure, U. S. Employment Service procedure, War Labor Board rules, and the like, are difficult for the small mill man to handle and the wholesaler can help him solve this problem. The same can be said of regulations of this Office, of the War Production Board, the Office of Defense Transportation and many others.

Moreover, the wholesaler frequently finances the operations of the small mills. He sees to it that the small mills

are given orders for lumber of a type which they are best able to produce, and that best suit the market at the time.

In some cases, a slight increase in mill realization may result from this action, for the wholesaler can pay mills the full ceiling price, with no necessity for any discount. It is believed, however, that by far the greatest benefit will be not so much in this occasional slight gain in realization, but in the general assistance that the wholesaler will offer in meeting some of the complex problems of production and distribution in war time.

It should be stated that the present plan enjoys the endorsement of the War Production Board as a measure which should be tried in an effort to increase production. It has also been approved by the Log and Lumber Policy Committee, whose members represent the War Production Board, the War Labor Board, the Office of Price Administration, the Forest Service, the War Manpower Commission and the Central Procuring Agency.

As to distribution, an efficient and economical system of lumber distribution is in its way just as essential as a production program: The problem of distribution of lumber for government needs (which directly or indirectly take 80 per cent of the total lumber production) has been changing markedly in the past few months, and the same change will apparently continue. This is a change away from the concentration of lumber in a few centers for large projects, and in the direction of the diffusion of lumber in much smaller individual quantities to many thousands of individual users, particularly or boxing and crating. During 1942 the principal lumber distribution problem was that of bringing huge quantities of lumber for construction purposes to centers where cantonments, storage warehouses, aircraft factories and the like were being built. In 1943 boxing and crating has overshadowed construction as a source of demand for lumber. The Central Procuring Agency, which, as now set up, is designed to handle the "concentration" type of lumber procurement, has stated repeatedly to this Office that it must rely upon the wholesalers to a much greater extent now that its problem has

changed from one of trainload quantities to carload quantities. For this reason, the Central Procuring Agency has strongly endorsed the present action, and has stated that if wholesalers were not available, it might eventually become necessary to build up a large paid staff of agents throughout the country to handle the distribution problem. Since the wholesaler is already equipped better than anyone else to perform this service, and since he is traditionally the principal distributing agent for direct-mill carload business, the only reasonable solution is to insure his continued ability to function.

For these reasons then, it is necessary that it be made possible for the wholesaler to continue in operation.

II. Necessity for Special Provision for Wholesaler's Margin

Up to this time, none of the lumber regulations has contained any formal provision giving the wholesaler a margin between his maximum buying and maximum selling prices on which to operate. The original plan of all the lumber regulations was to set the mill ceiling price, and to leave the wholesaler's margin a matter for negotiation between the mill and the wholesaler below the ceiling. As stated in the preamble to the first Southern pine schedule, the wholesaler's margin had been taken into account in setting the ceiling, and it was expected that customary discounts would be continued. As demand began to exceed supply, the reduction or elimination of wholesaler's discounts began, and the question of how to handle the wholesaler's margin was presented in increasingly acute form. However, the discounts were not made compulsory because, if they had been made compulsory, the mills would have tended to by-pass the wholesaler altogether, since the concentration of war demand together with the excess of demand over supply had produced a marketing condition in which the mill could dispose of its lumber without the services of the wholesaler and thereby get the full ceiling price. As this excess of demand over supply became more pronounced and as the concentration of demand in government projects increased, the process of reducing and eliminating discounts became more and more pronounced,

until the point was reached when in the Southern pine area discounts were the exception rather than the rule. This condition is evidenced by the testimony of hundreds of wholesalers, and their testimony is corroborated by the mills themselves.

For these reasons, it can be seen that a margin between his maximum buying and maximum selling price must now be provided for the Southern pine wholesaler if he is to perform the services which are shown above to be necessary to the war effort.

III. Necessity for addition to ceiling

The subject of the wholesalers' margin has been under constant study for the past two years, and dozens of conferences have been held with representatives of the different groups interested. The difficulty of reaching a solution has centered largely around the question whether the wholesalers' margin could be achieved in the form of a discount under the mill ceiling. The principal argument against a mandatory discount has already been indicated. That is the argument that the mills would refuse to sell through wholesalers if forced to allow a discount.

The second argument against the discount at this time lies in the fact that available data on the subject of costs of operation in the Southern pine area show that the producing mills cannot absorb the decrease in realization which the discount would represent. It has been suggested that the entire ceiling level could be raised by a given percent, and then a wholesaler's discount of the same percent imposed. However, this would mean an unnecessary and gratuitous price increase on all sales that did not move through wholesalers.

The most recent proposal that has been made is that the Central Procuring Agency, which is charged with the duty of securing lumber for most of the military services, should be required to buy at the same discount under ceiling that the wholesalers have to have in order to operate. This proposal does not overcome the first objection, but only re-

moves one of the classes of buyers to whom the mills would rather sell. If the mills can sell to retail yards, wholesale yards, industrial consumers, railroads and the like for $50, they certainly will not sell the same lumber to the wholesalers or the Central Procuring Agency for $47. This proposal would achieve the exact opposite of its purpose, in that it would take lumber away from the wholesalers themselves and also from the presumably highly essential uses for which the Central Procuring Agency is responsible. For these reasons the mandatory discount plan, and its several variations, have been found impractical. The plan adopted raises no more prices than are necessary to achieve the desired result, and also insures that the wholesaler and the Central Procuring Agency, as well as all other buyers, will stand on the same footing when purchasing lumber from the mills.

The principal argument against the present plan is that it departs from the tradition of the wholesale lumber industry of selling at the same price as the mills. As against this, it should first be noted that this tradition was less firmly established in the Southern pine area than in other parts of the country. The Southern pine wholesaler to a considerable extent merely bought at the best price possible and sold at the best price possible.

The second answer is that the conditions of marketing and the fundamental services of the wholesaler have changed sharply from what they were before the war. Of course, the wholesaler's function has always been a dual one: to find the source of the lumber for the buyer, and to find a market for the seller. In peacetime, and under normal market conditions, the function of finding the outlet for the seller's goods is by far the most important. At the present time, however, with the extreme shortage of lumber, and with buyers literally begging for lumber wherever they can find it, it is very clear that the principal service of the wholesaler is to find sources of lumber. It is, therefore, not inappropriate that compensation for this service should come in the form of an addition to the ceiling paid by the buyer.

In view of the extreme shortage of lumber, there is no substance to the argument that the higher sale price for wholesalers will make it difficult for them to sell lumber. The higher price is permissive, not mandatory. When demand drops to the point where the wholesaler cannot get the higher price, by the same token he will undoubtedly again be able to get his discount under the ceiling.

It follows that the fears of some wholesalers that the present action will destroy the tradition that the wholesaler sells at the same price as the mill are not well founded, since the traditional practice is the result of economic forces which will restore it when the wholesaler's principal function will again be to find a market for the product of the mill.

IV. Effect on the general price level

The effect of this action will not be to increase the final cost of lumber to the purchaser, and may indeed reduce it, because the present action will forestall the necessity for more expensive methods of distribution.

The six percent service charge is a much cheaper charge for distribution than the alternatives which would have to be resorted to in the absence of the wholesaler. The most common and most expensive alternative is the sale of lumber out of yard stocks. Since the retail and wholesale lumber yards have had mark-ups ranging from $5 and 10 percent up, they have been able to pay full ceiling to the mills and thereby get a buying advantage over the wholesalers. A great deal of lumber which could better have been sold for direct-mill shipment has needlessly carried the yard mark-up. This has resulted both in unnecessary handling and in a greatly increased cost of lumber. The present action permits both the yards and the wholesalers a 6 percent margin on direct-mill sales. This will mean that not only the wholesalers but the yards themselves will be able to sell for direct-mill shipment in far greater proportion than heretofore. Previously the yards have had no general mark-up for direct-mill sales, with the exception of the very limited direct-mill retail sale mark-up, which was

confined to small sales accompanied by retail services. It is very probable that by reducing the amount of lumber which carries the full yard mark-up, the total over-all cost of lumber in carload quantities will actually be reduced by the present action.

Moreover, as indicated before, the Central Procuring Agency would have to set up an elaborate organization to take care of the new demand problem if the services of the wholesalers could not be assured. It is impossible to predict what the cost of such a venture would be, but it is improbable that in the long run it would be cheaper or more efficient, in terms of actual service rendered, than the present plan.

To the extent that increased production is brought out, there will be a proportionate decrease in the general cost of lumber. Under present scarcity conditions lumber of far more expensive grades than necessary is being used. For example, the demands for dunnage, which is about the lowest priced lumber, have become so great that it has become necessary to purchase regular graded lumber to use as dunnage. In some cases this may almost double the cost of the dunnage. Similarly, special stress grades are being used where ordinary grades would do, and No. 1 boards are being used where No. 2 boards would do. It is probably no exaggeration to say that for every additional thousand feet of No. 2 Common Southern pine lumber produced there is a saving of about $5 per thousand, resulting from the fact that there is that much less No. 1 Common that has to be used for a purpose where No. 2 would do.

First, as to the exact amount of the addition, a study was made by the National American Wholesale Lumber Association of the actual costs of doing business in the wholesale direct-mill industry. This study showed that a margin of 6 percent would approximately cover the costs of operation. The study covered the year 1941. It represented eighty-six million dollars worth of business done by 83 representative wholesalers in all areas.

The service charge has been limited to Southern pine, and there is no intention to generalize it by extending it to other areas. There are several reasons for this limitation. One is that the loss of discounts was by far the most acute in the Southern area. Of course, there have been complaints from other areas that the wholesalers are having difficulty getting their full discounts, but it is only in the Southern pine lumber business that the very existence of the wholesalers as a class is threatened. The second reason for the limitation, which was mentioned earlier, is that the practice of selling to the wholesaler at a fixed discount off the mill price was not as well established in the Southern area as elsewhere. The third reason is that the problem of bringing out the production of small mills is by far the most acute in this area. The southern mills are typically small. There are only a few of the size which is typical in the Western area.

One of the gravest hazards of a plan of this kind lies in the possibility that unnecessary middlemen and additions may be interposed in the distribution of lumber. For this reason the amendment provides, in effect, that only those who were wholesalers or commission men during the first six months of 1943 or during 1942 may make the addition. A somewhat similar limitation is placed on the distribution yards. However, since it would be improper to create a virtual monopoly and close out those who wish to go into the business for the first time, provision has been made for giving such permission to the new wholesalers and commission men.

For the same reason of preventing unnecessary routing of lumber through wholesalers, it is provided that where the mill controls the distributor or the distributor controls the mill, or both are under common control, the addition may not be made. The reason for this is obvious. When a mill owns a selling corporation, or when a wholesaler owns a mill, the arrangement is really no different from that of a mill which sells through its own paid sales staff. If the exception were not made, it would happen that wherever

common control existed all the mill's lumber would go through the wholesaler, whether it had before or not. None of the arguments advanced in this statement apply when this financial control exists. If a discount has been denied in these circumstances in the past, it has obviously been a case of taking money out of one pocket and putting it in another.

Another detail is the provision on how to apply the mark-ups in Maximum Price Regulation 215, Distribution Yard Sales of Softwood Lumber, to the increased price resulting from this action.

The mark-ups for yards under Maximum Price Regulation 215 have been computed on the basis of costs of doing business, and it would be equally unjustifiable to increase or to decrease the margin provided by these mark-ups. It is impossible to work out a method of handling the increased cost to yards in a manner which will be completely satisfactory to all yards, since some yards buy all their lumber from wholesale distributors, some buy none from them, and some buy in both ways. The practice varies from region to region. Generally, the more remote the yard is from the producing territory, the more it has to rely on distributors, but this is only a very rough rule. It is impractical to ask yards to trace what lumber they bought each way, or to keep a perpetual inventory with a continuously fluctuating sale price depending on the proportions of lumber bought through distributors.

The only practical plan is to permit all yards to pass on an amount representing the average increased cost for all yards. This average increased cost may be estimated at 4 per cent. This estimate takes into account the following factors: first, that about 75 to 85 per cent of Southern pine lumber in yard stocks is normally bought through distributors; second, that while most of the distributors' sales will carry the 6 per cent wholesalers' addition, a very large part will carry only the 4 per cent commission men's addition; and third, that the final yard mark-up will be applied to the 4 per cent increase allowed in the base price,

with the result that the 4 per cent will actually amount to between 4.4 per cent and 6 per cent. In summary, therefore, the 4 per cent allowed will leave the average profit position of the yards where it now is.

VI. Direct-mill sales by yards

The statement up to this point has spoken of the plan almost entirely as if it dealt with wholesalers. However, a direct-mill mark-up of 6 per cent is made available to wholesale and retail distribution yards. Since the outbreak of war, the direct-mill type of business has become an important part of the business of many yards. This is partly due to the fact that demand has been so great and the quantities have been so unusual that there was no need to route lumber through the yards. The only provision previously made for direct-mill sales by retail yards was an addition of $3.50 on sales of less than carload quantity to consumers, when the sale was accompanied by typical retail services. The previous addition was intended to apply mostly to lumber that moved by truck, but the new addition may be used on all business including carload business.

To the extent that yards perform the same functions as wholesalers, the discussion earlier in this statement applies to them, and the same reasons for the action apply.

VII. Commission men

Commission men differ from wholesalers primarily in that they do not take title to the lumber they sell, but rather act as an agent in the sale. Because of this difference, they have in the past received a commission somewhat smaller than the wholesaler's discount. The ratio of 4 per cent to 6 per cent roughly approximates the traditional relation.

The objection has been raised by some commission men that this plan will result in a buying disadvantage for them as against wholesalers. They argue that a mill, confronted with the choice of selling to a wholesaler or through a commission man, will prefer to sell to the wholesaler if the net realization is the same. The reason for the preference

would lie in the fact that the wholesaler carries the account and assumes the credit risk, while the commission man does not. Some commission men therefore argue that the maximum price at which a mill may sell to a wholesaler should be at least 2 per cent less than the mill's realization when it sells through a commission man.

There are several answers to this argument. The first is that there is nothing to prevent the commission man from offsetting this buying advantage of the wholesaler by having the customer pay cash for his lumber. Under present market and credit conditions, this would not be a hardship on the buyer. In fact, it is already being done in many cases.

The principal answer to the argument, however, is that it is impossible to make the suggested adjustment in relative buying prices without so badly complicating the plan as to make it unworkable. If the plan were to provide identical selling prices for wholesalers and commission men, and a 2 per cent higher buying price for commission men, this could only be done in one of two ways. Either they would both be allowed to sell at 6 per cent over the regular ceiling, with the wholesalers to have a discount of 6 per cent and commission men of 4 per cent; or they would both be allowed to sell at 4 per cent over ceiling, with similar discounts to apply. Let us suppose that the regular ceiling price is $50. Under the first plan the mill would realize $50 in selling to a wholesaler and $51 in selling through a commission man. This may be satisfactory as far as it goes, but it leaves out of account the fact that there are several other classes of buyers who also must be considered: namely, all direct buyers, such as industrials, retail yards, railroads, and the like; and the Central Procuring Agency, which is responsible for military requirements of lumber. If the mill realized $51 in selling through a commission man, it would naturally not sell for $50 to any of these direct buyers, or through the Central Procuring Agency. It should be noted that these other buyers resemble the commission man in that they do not necessarily

guarantee the account nor pay cash. This suggestion of the commission men, therefore, would very plainly make it impossible for the Central Procuring Agency to operate and would result in severe discrimination against all buyers of lumber who buy direct from the mill.

The alternative would be to increase the ceiling only 4 per cent and apply the same relative discounts. The difficulty with this plan would be that it would require the mills to give the wholesalers a 2 per cent discount from their regular ceiling prices. The complications introduced by this feature would alone be sufficient reason for rejecting it. It would mean that the basic problem which this action is designed to deal with would still be left unsolved. That is the problem how to get the mills to allow wholesalers' discounts in a demand market. The difficulty would only be reduced in degree and all the problems of administration that existed before would continue to exist. Finally, the action would, by involving a compulsory discount from the mill's regular ceiling, raise the entire question of the adequacy of mill realization, whereas the present action is based on the position of the distributors themselves as an industry.

For these reasons the plan simply provides for a 4 per cent addition to the regular ceiling when sales are made through commission men.

All of the possible variations of the plan have been carefully compared and discussed. All of the Government agencies concerned, and practically all of the industry groups affected, agree that the plan adopted by this amendment is the best plan that can be devised in the circumstances, in the light of the conflicting interests involved and of the need for keeping the plan as simple as possible and particularly of obtaining the maximum aid to the production and distribution of Southern pine lumber under the abnormal conditions that have resulted from the war.

OPPOSITION

BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 343

BRISTER & KOESTER LUMBER CORPORATION,
PETITIONER

v.

EDGAR C. TURNEY, DIRECTOR, DIVISION OF LIQUIDATION, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Emergency Court of Appeals (R. 119-124) has not yet been reported.

JURISDICTION

The judgment of the Emergency Court of Appeals was entered on August 25, 1949 (R. 125). The petition for a writ of certiorari was filed on September 20, 1949. The jurisdiction of this Court

is invoked under Sections 1(b) [1] and 204(d) of the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901(b) and 924(d)), and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the failure of Section 205(e) of the Emergency Price Control Act of 1942 to provide immunity from liability for an allegedly innocent vendor of commodities sold at prices in excess of applicable ceilings contravened the due process clause of the Fifth Amendment.

STATUTE INVOLVED

Section 205 of the Emergency Price Control Act of 1942 (c. 26, title III, 56 Stat. 23, 50 U.S.C. App., 1940 ed., Supp. II, 925(e)), prior to and for some time after April 21, 1944, the date which marked the end of the period of petitioner's alleged over-ceiling sales, provided in pertinent part:

> (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus rea-

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[1] While the Emergency Price Control Act is no longer in effect, Section 1(b) preserves it in force "for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense" incurred or committed before the termination date.

sonable attorney's fees and costs as determined by the court. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. * * *

STATEMENT

Petitioner, as a wholesaler of southern pine lumber, was subject successively to the provisions of Revised Maximum Price Regulation 19 (issued April 26, 1943, 8 F. R. 5536) and 2nd Revised Maximum Price Regulation 19 (issued January 29, 1944, 9 F. R. 1162), issued by the Price Administrator under the authority of the Emergency Price Control Act of 1942 (R. 1-2). There is pending against petitioner in the United States District Court for the Southern District of New York an action instituted by the Price Administrator to recover treble damages on account of sales by petitioner of southern pine lumber at prices in excess of those established by these two regulations and another, the validity of which petitioner has not attacked. After this suit was filed, and pursuant to the provisions of Section 203 of the Act (50 U.S.C. App. 923), petitioner filed a protest with the re-

spondent, who succeeded to those functions of the Price Administrator which are involved here (R. 1), challenging the validity of RMPR 19 and 2nd RMPR 19 (R. 2).[2] Of the six grounds of objection asserted in the protest (R. 11-13) only one, however, is now urged (Pet. 13).

In so far as here relevant, the basis of petitioner's objection to the regulations was that they subjected it to liability for damages by reason of violations by the lumber mills of which petitioner was assertedly not only wholly innocent, but ignorant as well (R. 12). Petitioner claimed that in the direct mill sales, in which many of the claimed violations arose, it ordered the mill to ship certain grades and quantities of lumber to its customers. While petitioner took title at the mill, it claims it did not and could not inspect the lumber before shipment. It merely received an invoice from the mill and in turn sent its own invoice to the customer. (R. 3.) It contended, therefore, that it could do no more than determine that the prices it charged for the grades and quantities of lumber specified in the invoices did not exceed the maximum prices prescribed by the regulations, that it could not know whether the lumber as shipped conformed to the invoices (R. 12), and, consequently, that it should not be held liable under the Act for

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[2] The validity of the regulations could not be challenged in the enforcement suit, since Section 204(d) (50 U.S.C. App. 924(d)) vested exclusive jurisdiction of such questions in the Emergency Court of Appeals and this Court.

over-ceiling prices resulting from any disparity in such shipments.

Its protest having been denied (R. 91-93), petitioner, pursuant to Section 204(a) of the Act (50 U.S.C. App. 924(a)), filed a complaint in the Emergency Court of Appeals (R. 110-113) seeking a determination that the two regulations were invalid. That court dismissed the complaint (R. 125).

ARGUMENT

At the threshold of this discussion, it should be noted that in asserting the invalidity of RMPR 19 and 2nd RMPR 19, petitioner has misdirected its objection. The regulations, in so far as here relevant, did no more than establish maximum prices and prohibit sales at prices in excess of those thus fixed. The penalties for violations of the regulations were prescribed by Section 205 of the Act. Petitioner, of course, is not attacking the obviously unexceptionable regulatory prohibition of over-ceiling sales, but rather the imposition of penalties for what it claims to be wholly innocent violations. Were there any merit in petitioner's contention, the offensive provision would have been in the Act itself and not the regulations which petitioner seeks to have declared invalid.

But, we submit, petitioner's objection, wherever directed, is wholly lacking in merit. The Act validly required compliance with the maximum prices established by the Price Administrator.

Yakus v. *United States,* 321 U. S. 414. It also provided for "a reasonable and measured recovery * * * for violation of a statute involving the public interest," and in so doing, met the requirements of due process. *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597, 600 (C.A. 7), certiorari denied, 326 U. S. 794; *Speten* v. *Bowles,* 146 F. 2d 602, 604 (C.A. 8), certiorari denied, 324 U. S. 877; *Regan* v. *Kroger Grocery & Baking Co.,* 386 Ill. 284, 54 N.E. 2d 210; cf. *Walsh* v. *Gurman,* 132 Conn. 58, 42 A. 2d 362.

The real question implicit in petitioner's objection is, of course, the propriety of the statutory imposition of penalties for innocent violations. *Porter* v. *Bledsoe,* 159 F. 2d 495, 497 (C.A. 4); *Thierry* v. *Gilbert,* 147 F. 2d 603 (C.A. 1). The answer to that question lies in the fact that in a time of crisis the economy of the nation was threatened by almost irresistible inflationary forces. A seller's market prevailed, in which buyers, competing for goods in short supply, were at the mercy of those who had things to sell. *Porter* v. *Bledsoe, supra; Bowles* v. *Soverinsky,* 65 F. Supp. 808, 812 (E. D. Mich.). The buying public was unable to protect itself and generally dared not even complain. *United States* v. *Bruno,* 329 U. S. 207. In these circumstances, we submit, the imposition of an absolute obligation to comply with the applicable price regulations was both appropriate and unavoidable.

It is responsibility for the performance of this obligation which petitioner seeks to avoid by its claim of innocence.[3] It urges that it did not and could not know that the lumber shipped by the mills in its behalf failed to conform to the invoices, and argues that to hold it liable for damages in such circumstances contravenes the requirements of due process (Pet. 13).[4] But, having taken title to the lumber at the mills, which shipped at its directions (R. 123), petitioner is merely saying that it delegated to others compliance with an obligation which, for the protection of the public, was imposed by law upon it as the seller. Petitioner could not escape liability for the violation of that obligation by such delegation (*Porter* v. *Bledsoe, supra; Regan* v. *Kroger Grocery & Baking Co., supra*), and its inability thus to avoid liability involves no conflict with the requirements of due process. Cf.

[3] If petitioner can establish that its violations were "neither wilful nor the result of failure to take practicable precautions," the damages, in the event the Government prevails in the enforcement suit, will be limited to the amount of the overcharges. Section 205(e) of the Act was amended to this effect by the Stabilization Extension Act of 1944 (c. 325, title I, sec. 108(a), 58 Stat. 640) and the Price Control Extension Act of 1946 (c. 671, sec. 12(a), 60 Stat. 676, 677).

[4] The court below rejected petitioner's claim that it could not check the mills' shipments (R. 123). Petitioner's latest statement of the magnitude of the problem (Pet. 9-10) exaggerates the difficulty and by no means demonstrates the impossibility of precautionary measures. Thus, the services of the Southern Pine Inspection Bureau could have been utilized for the purpose (see R. 5). In any event, petitioner is saying no more than that reliance upon agents was necessary. But the fact that an agency was necessary does not relieve the principal of responsibility for his agent's acts or omissions within the scope of the agency.

United States v. *Parfait Powder Puff Co., Inc.*, 163 F. 2d 1008 (C.A. 7), certiorari denied, 332 U. S. 851; see also *United States* v. *Balint*, 258 U. S. 250.

CONCLUSION

Far from posing any substantial question of due process, petitioner has presented nothing warranting review of the well settled law applicable to this case. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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OCTOBER 1949.

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